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IN THE

Supreme Court of the United States

October Term, 1966

No. 1186

HARRY SCHACKMAN; JOSEPH GROSS; NATHAN DELUCA; HARRY PINCH; CHARLES GARY STRIEBY and JOSEPH RICHARD TOUART,

Petitioners,

vs.

ROGER ARNEBERGH, City Attorney for the City of Los Angeles, et al.,

Respondents.

WILLIAM PINKUS,

Petitioner,

vs.

ROGER ARNEBERGH, City Attorney for the City of Los Angeles, et al.,

Respondents.

JURISDICTIONAL STATEMENT

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IN THE

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October Term, 1966

No. .....

HARRY SCHACKMAN; JOSEPH GROSS; NATHAN DELUCA; HARRY PINCH; CHARLES GARY STRIEBY and JOSEPH RICHARD TOUART,

Petitioners,

vs.

ROGER ARNEBERGH, City Attorney for the City of Los Angeles, et al.,

Respondents.

WILLIAM PINKUS,

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vs.

ROGER ARNEBERGH, City Attorney for the City of Los Angeles, et al.,

Respondents.

JURISDICTIONAL STATEMENT

(Rules XIII(2) and XV, Rules on Appeal)

(a) This is a joint appeal taken from the final decisions and orders of the United States District Court, Central District of California, in which decisions and orders the Court (1) refused to impanel a three-judge Federal Court; (2) denied the declaratory and injunctive relief sought by Appellants; and (3) granted summary judgment in favor of all Respondents. Said final decisions, together with

Findings of Fact and Conclusions of Law, were entered by the Court in each case on September 27, 1966. (Appendices A & B respectively) Said decisions are reported in 258 F.Supp. 983 and 258 F.Supp. 996, respectively. On January 30, 1967, the Court granted Appellant's motion to consolidate the within cases on appeal due to the identical nature of the issues presented in each case. Appellants' respective motions for an extension of time to docket the record with this Court were granted in each case on December 2, 1966 (Appendices C & D respectively), January 12, 1967 (Appendices C & D respectively), February 3, 1967 (Appendices C & D respectively) and March 8, 1967 (Appendices C & D respectively). The last such extension grants to Appellants up to and including March 30, 1967, to docket the record with this Court. (The term "Appellants" as hereinafter used shall mean Appellants in case No. 66-784-AAH and Appellant in Case No. 66-861-AAH).

(b) The jurisdiction of this Court is invoked on the grounds inter alia that California Penal Code § 311.2 has been sustained against a claim of unconstitutional application under the Federal Constitution and that the Court below erred in failing to convene a three-judge Federal Court to restrain the enforcement, operation and execution of said Penal Code § 311.2. Other questions raised also invoked Federal Constitutional questions and invoked the jurisdiction of this Court. (See *infra*).

(i) Appellants brought a complaint for injunctive and declaratory relief praying that a three-judge Court be impaneled for the purpose of, among other things, restraining the enforcement, operation and execution of

California Penal Code § 311.2 (the obscenity statute) and declaring that said Penal Code Section, as applied pursuant to and as a result of a conspiracy on the part of Respondents, violated Appellants' rights as guaranteed by the First, Fourth and Fourteenth Amendments to the United States Constitution and the Federal Civil Rights Act (Title 42, U.S.C.A. §§ 1981 through 1985, inclusive).

(ii) The decisions of the District Court was entered on September 27, 1966, without opinion, although Findings of Fact and Conclusions of Law were made. (Appendices A and B).

(iii) Jurisdiction of this Court is conferred by Title 28, United States Code § 1253.

(iv) For case authority conferring jurisdiction upon this Court, see:

1. Appellate Jurisdiction: *Radio Corp. of America v. United States* (D.C. Ill.), 95 F.Supp. 660, affirm 341 U.S. 412, 71 S.Ct. 806, 95 L.Ed. 1062.

2. Generally as to subsidiary questions involving Constitutional issues: *Scott v. Donald,* 165 U.S. 58, 170 S.Ct. 265, 41 L.Ed. 632.

3. Injunctive relief available against state officers who proceed to enforce a state statute in a manner violating the Federal Constitution: *Ex Parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714; *Dombrowski v. Pfister,* 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22; *Cameron v. Johnson,* 381 U.S. 741, 85 S.Ct. 1751, 14 L.Ed.2d 715.

4. Allegations that police officers acting under color of state custom or usage to deprive a person of rights

guaranteed by the Federal Constitution sufficient to state a cause of action and to give jurisdiction under the Civil Rights Act: *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492; *Cohen v. Norris*, 300 Fed.2d 24.

5. Vague and standardlessness of statutes: *Giaccio v. Pennsylvania*, 382 U.S. 399, 86 S.Ct. 518, 15 L.ed.2d 447; *Raley v. Ohio*, 360 U.S. 423, 79 S.Ct. 1257, 3 L.Ed.2d 1344; *Winters v. New York*, 333 U.S. 507, 68 S.Ct. 665, 92 L.Ed. 840; *United States v. Petrillo*, 332 U.S. 1, 67 S.Ct. 1538, 91 L.Ed. 1877.

6. The requirement of a prior adversary proceeding: *Cotting v. Goddard*, 183 U.S. 79, 22 S.Ct. 30, 46 L.Ed. 92; *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714; *United Public Works v. Mitchell*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754; *Oklahoma Operating Company v. Love*, 252 U.S. 331, 40 S.Ct. 338, 64 L.Ed. 596; *A Quantity of Books v. Kansas*, 378 U.S. 205, 84 S.Ct. 1237, 12 L.Ed.2d 809; *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649; *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 77 S.Ct. 1325, 1 L.Ed.2d 1469; *Marcus v. Property Search Warrants*, 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127; *N.A.A.C.P. v. Button*, 371 U.S. 415, 83 S.Ct. 1328, 9 L.Ed.2d 405; *Mills v. Alabama*, 384 U.S. 214, 86 S.Ct. 1434, 16 L.Ed.2d 484; *Dombrowski v. Pfister*, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22.

7. Prior restraint: *Speiser v. Randall*, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460; *Marcus v. Property Search Warrants, supra; A Quantity of Books v. Kansas, supra; Bantam Books v. Sullivan*, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584, *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498.

8. Knowledge of obscenity: *Redrup v. New York*, Cert. granted April 25, 1966; *Austin v. Kentucky*, Cert. granted April 25, 1966.

9. Proof of corpus delicti of offense: *United States v. Klaw*, 350 Fed.2d 165 (2nd Cir); *United States v. One Carton of Positive Motion Picture Film*, 248 Fed. Supp. 373; *United States v. 392 Magazines entitled "Exclusive"*, 253 Fed.Supp. 485.

10. "Due process" and "equal protections": All cases above cited and *Palco v. Connecticut*, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288.

11. Error not to convene three judge Federal Court: *Idelwild Liquor Corp. v. Epstein*, 370 U.S. 713, 82 S.Ct. 1294, 8 L.Ed.2d 794.

12. Applicability of convening three judge Federal Court to facts of instant appeals: *Evergreen Review, Inc. v. Cahn*, 230 F.Supp. 498.

(v) California Penal Code Section 311 is found in Stats. 1961, c. 2147, p. 4427, § 5, and reads as follows:

"§ 311. Definitions

"As Used in this chapter:

"(a) 'Obscene' means that to the average person, applying contemporary stands, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance.

"(b) 'Matter' means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

"(c) 'Person' means any individual, partnership, firm, association, corporation or other legal entity.

"(d) 'Distribute' means to transfer possession of, whether with or without consideration.

"(e) 'Knowingly' means having knowledge that the matter is obscene."

Section 311.2 of the California Penal Code is found in Stats. 1961, c. 2147, p. 4428, § 5, and reads as follows:

"§ 311.2 Sending or bringing into state or sale or distribution; printing, exhibiting, distributing or possessing within state

"Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor."

(c) The questions presented on appeal are as follows:

(i) Whether the Court below erred in failing to convene a three judge federal court for the purpose of restraining the enforcement, operation and execution of

California Penal Code § 311.2 in light of the fact that said statute was challenged as being contrary to the United States Constitution.

(ii) Whether California Penal Code § 311 and § 311.2, both on their face and as applied, are unconstitutional in violation of Amendments I, IV and XIV to the United States Constitution in that the statute is vague and "standardless". More specifically, under the statutes defendants were permitted to be convicted of exhibiting and distributing allegedly obscene film in a situation where the only evidence presented by the prosecution were the films themselves. No other evidence of "contemporary standards" was introduced.

(iii) Whether said Penal Code sections are unconstitutional in that said statutes do not provide for notice to an exhibitor or distributor that, in the opinion of the law enforcement authorities, the material which is being exhibited and distributed is obscene. As a result, an exhibitor or distributor who is uncertain as to the obscenity or non-obscenity of a particular film is compelled to forego the doing of a legal act or conducting a legitimate business or, in the alternative, is forced to assume the risk of sanctions being imposed after a criminal trial.

(iv) Whether said statutes, in permitting a seizure or arrest of constitutionally protected materials without prior judicial hearing, are unconstitutional and condone a prior restraint.

(v) Whether, in a prosecution for exhibiting or distributing obscene film, the prosecution must prove that the defendant in fact had knowledge that the allegedly obscene material was obscene.

(vi) Whether as a matter of law the evidence was insufficient to sustain the conviction of Appellants, in that:

1. The prosecution failed to offer any evidence of "community standards" which is a part of the corpus delicti of the crime.

2. The prosecution failed to prove that the exhibition or sale of the films was done with knowledge that the films were obscene.

(vii) Whether the motion picture films upon which the convictions were based are constitutionally protected by virtue of the United States Constitution, Amendments I and XIV.

STATEMENT OF THE CASE

In two different complaints different appellants alleged essentially the same facts bringing them within the jurisdiction of the United States District Court and the "Civil Rights" Act.

In Case No. 66-784, AAH (Harry Schackman, etc., et al) the Appellants alleged that they had been and were then presently engaged in the exhibition and sale of motion pictures, commonly known as "girlie" films. On some of these films, each of the Appellants had been convicted of violation of the California Obscenity Statute. One cause of action for declaratory relief was premised on the fact that these motion pictures were constitutionally protected under the First and Fourteenth Amendments to the United States Constitution and that they should be so declared by the Court and the convictions voided.

William Pinkus, the Appellant in case No. 66-861, AAH, asked for similar relief on similar films and also, prospectively, asked for a declaration that certain "nudists" magazines which were sold in his bookstore were constitutionally protected material alleging, inter alia, that the Appellant did not know and had no way of knowing whether the magazines were so protected.

All Appellants alleged that the application of the California Obscenity Statute was unconstitutional and that it was unconstitutionally enforced in the following respects:

1. That although requested of the involved authorities, no opinion was given by the law enforcement agencies as to whether the sale of a book or the exhibition of a film would subject the Appellant to arrest.

2. That the procedure followed by law enforcement officials in determining whether or not a complaint would be issued for a misdemeanor violation on both books and magazines was generally that a police officer would go into one of Appellant's establishments and either buy a magazine or view a film and then purchase an 8mm reproduction of the film which he had viewed. The officer would then proceed to the office of the City Attorney or the District Attorney and the subject matter would be reviewed by a Deputy District Attorney or City Attorney who would then determine whether or not they thought the matter to be "prosecutable". If the District Attorney or City Attorney thought the matter was "prosecutable" then in the case of the Sheriff's Office a complaint would be issued charging the Appellant with a violation of the criminal statute. In the case of the Los Angeles City Police officer, the officer would go back to the establish-

ment and try and ascertain whether or not the same film was being shown and if it was he would make an arrest without a warrant. In either case, a search would generally ensue in which copies of the alleged offending books or films were taken, usually with books and records of the establishment, based on the premise that the ensuing search was "incident" to a lawful arrest.

In no instance was the alleged offending matter ever presented to a magistrate for a determination as to whether or not a complaint should be issued (i.e., whether the matter was constitutionally protected) this remedy being left to the Appellants after arrest and being charged with the crime.

At the outset of the case, the Judge of the District Court made a determination over objection of the Appellants that the complaint did not call for the impaneling of a three judge Federal Court and that he, the Judge sitting alone, could decide all issues. Thereafter the Court viewed the films, reviewed the magazines and without any testimony being taken entered summary judgments in favor of all the defendants and issued the Memorandum of Law reported in 258 F.Supp. at pages 983 and 996, respectively.

Essentially this appeal calls for a review by this Court of the determination of the trial court that a three-judge Court was not required as a matter of law (and thus the Court below was without jurisdiction to proceed further); and, hopefully, it is requested that this Court review the material presented before the Judge below in order that a judgment be rendered in favor of Appellants that the material is constitutionally protected and that the applica-

tion of the statutes as described in the complaint and the stipulations of the parties involves an unconstitutional enforcement and denies to the Appellants, and each of them, equal protections and due process of law.

Respectfully submitted,

MARKS & SCHNEIDER

BURTON MARKS

Attorneys for Petitioners.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HARRY SCHACKMAN; JOSEPH GROSS; NATHAN DELUCA; HARRY PINCH; CHARLES GRAY STRIEBY and JOSEPH RICHARD TOUART,

Petitioners,

vs.

ROGER ARNEBERGH, City Attorney for the City of Los Angeles; EVELLE J. YOUNGER, District Attorney for the City of Los Angeles; WILLIAM H. PARKER, Chief of Police of the City of Los Angeles; PETER J. PITCHESS, Sheriff of the County of Los Angeles, THOMAS C. LYNCH, Attorney General of the State of California; MUNICIPAL COURT OF THE BEVERLY HILLS JUDICIAL DISTRICT, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA; MUNICIPAL COURT OF THE LOS ANGELES JUDICIAL DISTRICT, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA; and BOARD OF POLICE COMMISSIONERS OF THE CITY OF LOS ANGELES,

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No. 66-784-AAH
DECISION,
FINDINGS OF
FACT AND
CONCLUSIONS OF
LAW

Complaint for declaratory judgment and injunction in which petitioners, following an increasingly apparent trend of smut peddlers under vigorous attack by city, county and state law enforcement, invoke the aid of the Federal Courts by seeking refuge in the Federal civil rights statutes enacted in the post-Civil War and Reconstruction Period for the protection of Negro civil and constitutional rights.

Petitioners seek the empanelment of a three-judge court; a declaration that the films exhibited and sold by them were and are not obscene or hard core pornography; a further declaration that their prosecutions, actual and threatened, were and are violations of petitioners' civil

and constitutional rights; and injunctive relief restraining respondent City, County and State courts and law enforcement agencies and officers from actual and threatened prosecutions.

Upon petitioners' motion for preliminary injunction and respondents' motions for summary judgment and motions to dismiss (here treated as motions for summary judgment), the Court refused to empanel a three-judge court; denied the declaratory and injunctive relief sought by petitioners; and granted summary judgment in favor of all respondents. In so doing the Court held that the films were clearly obscene and constituted hard core pornography; that petitioners were not deprived of any civil or constitutional rights; and that the City, County and State courts and law enforcement agencies and officers should not be restrained from prosecuting petitioners for exhibiting and selling the films.

—o—

Burton Marks, Beverly Hills, California, for petitioners.

Harold W. Kennedy, County Counsel, by Irvin C. Taplin, Jr., Deputy County Counsel, Los Angeles, California, for respondents Evelle J. Younger, Los Angeles County District Attorney, Beverly Hills Municipal Court and Los Angeles Municipal Court;

Roger Arnebergh, City Attorney, Robert B. Burns, Assistant City Attorney, by George J. Franscell, Deputy City Attorney, Los Angeles, California, for respondents Los Angeles City Attorney Roger Arnebergh, Los Angeles City Chief of Police William H. Parker, Los Angeles Board of Police Commissioners;

Thomas C. Lynch, Attorney General, by A. Barry Cappello, Deputy Attorney General, Los Angeles, California, for respondent California State Attorney General Thomas C. Lynch.

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This is an action for declaratory judgment and injunction brought by the owners, operators and employees of so-called "arcade" establishments in Los Angeles and Beverly Hills, California, where petitioners exhibit and sell "nudie" motion picture films. The method of operation is to exhibit the films in small booths, utilizing "peep show" machines which are activated when customers deposit silver coins for metered showings measured in terms of minutes proportionate to the value of the coins deposited. After viewing the films, the customers can later purchase the same.

Petitioners have been prosecuted and convicted by respondents for violation of California Penal Code §311 and §311.2, the State obscenity statute,[1] and now pro-

[1] California Penal Code 311

"§ 311. *Definitions*

As used in this chapter:

(a) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance.

(b) 'Matter' means any book, magazine, newspaper or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

ceed under the Federal Civil Rights Act (42 U.S.C. 1981-1985, 1988) seeking the empanelment of a three-judge Federal Court (28 U.S.C. 2281-2284) for a declaration that the films were not obscene as a matter of law and that the enforcement, operation and execution of the California obscenity statute has deprived and will continue to deprive petitioners of their civil and constitutional rights protected by the First (freedom of speech), Fourth (freedom from unreasonable searches and seizures), and Fourteenth (equal protection of the laws) Amendments of the United States Constitution. Additionally, petitioners also seek injunctive relief against the various respondent courts and law enforcement agencies and officers of City, County and State to prohibit them from conducting such prosecutions, together with an order compelling the law enforcement agencies and officers to set up a pre-prosecution censorship system to which petitioners could submit future films for a determination as to obscenity prior to exhibiting and selling them.

Originally coming on for hearing upon petitioners' motion for a preliminary injunction and respondents' mo-

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1 (continued)

(c) 'Person' means any individual, partnership, firm, association, corporation, or other legal entity.

(d) 'Distribute' means to transfer possession of, whether with or without consideration.

(e) 'Knowingly' means having knowledge that the matter is obscene."

"§ 311.2. *Sending or bringing into state for sale or distribution; printing, exhibiting, distributing or possessing within state*

"Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State prepares, publishes, prints, exhibits, distributes or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor."

tions to dismiss the complaint and motions for summary judgment, extensive evidence was presented by both sides and received by the Court at hearings which ran for four days, including the films themselves, which were marked as exhibits and viewed by the Court in their entirety throughout lengthy and eventually boring sessions. Detailed and comprehensive affidavits were submitted by respondents covering all stages of the law enforcement procedures followed in the prosecutions of petitioners. Because of this receipt of evidence and by stipulation of the parties the motions to dismiss were treated as motions for summary judgment, all parties having been given reasonable opportunity to present all material pertinent to the issues. Rule 12(b) and Rule 56, *Federal Rules of Civil Procedure. Moss v. Hornig,* 214 F.Supp. 324, 330-331 (D. Conn. 1962); *North American Iron and Steel Co. v. United States,* 130 F.Supp. 723, 724 (E.D. N.Y. 1955); *Hibben v. Kuchaj,* 117 F.Supp. 55, 56 (N.D. Ill. 1953).

After full consideration of the pleadings and the evidence submitted by the parties, after hearing all arguments by the parties, and after full consideration of the points and authorities presented to the Court in support of the respective positions of the petitioners and the respondents, the Court now makes its decision, findings of fact and conclusions of law that petitioners' application for a convocation of a three-judge Federal Court be denied, and that summary judgment be entered in favor of respondents.

So that the facts will be clear and the findings incontestably correct, the Court must describe in detail the films which it viewed and the actions and gyrations of the models and actresses whose duplicating displays of

obscenity and pornography are the central and only themes of these tiresome titillations.

Let, then, the reader be duly warned so that any shock or disgust generated be directed at the films themselves and not at the Court. It is high time that the facts of obscenity and hard core pornography be faced in their full, complete, stark and revolting essence, relieved only by the tawdry tediousness generated by their predominant and pounding appeal to the prurient. If four-letter words are used by the Court, they were used by the shoddy actresses in the films and they should be read in the context of the California obscenity statute (Penal Code Sections 311 and 311.2). The appeal of the films, taken as a whole, is to a shameful and morbid interest in nudity, sex, and the female organs of sex and excretion, going substantially beyond customary limits of candor in description and representation, and utterly without redeeming social importance.

Sensitive souls may wince at the facts which follow, but no one can gainsay their truth, delineated as accurately as possible.

Borrowing the jargon of the street, it is time to "tell it as it is", to say what this trash actually is, though embarrassingly filthy and wearisomely boring the task may be. So the Court proceeds with the fact finding and the legal conclusions.

The Court having heard the arguments and having examined the proofs offered by the respective parties, and the cause having been submitted for decision, and the Court being fully advised in the premises makes its findings of fact as follows:

FINDINGS OF FACT

1. That the respondent William H. Parker was the Chief of Police of the City of Los Angeles and had been a member of and the General Manager and Chief Administrative Officer of the Police Department of the City of Los Angeles, which Department has the powers and duty of enforcing the laws of the State of California within the territorial limits of the City of Los Angeles, including the apprehension and arrest of persons reasonably believed to be in violation of Penal Code Section 311.2.

2. That William H. Parker died on July 16, 1966.

3. That the respondent, Roger Arnebergh, was and now is, City Attorney for the City of Los Angeles and at all times mentioned in petitioners' complaint, said respondent was and now is, the duly elected and acting City Attorney of the City of Los Angeles, empowered and required by the Charter of the City of Los Angeles to prosecute any and all misdemeanor offenses occurring within the territorial limits of the City of Los Angeles, including prosecution of Penal Code Section 311.2, a misdemeanor offense.

4. That at all times mentioned in petitioners' complaint, respondent, Evelle J. Younger, was and now is, the duly elected and acting District Attorney for the County of Los Angeles, State of California, empowered and charged with the duty of prosecuting any and all felonies within said County and any and all misdemeanor offenses occurring within the unincorporated territory of said County, including the prosecution of Penal Code Section 311.2, a misdemeanor offense.

5. That at all times mentioned in petitioners' complaint, respondent Peter J. Pitchess, was and now is, the duly elected and acting Sheriff of the County of Los Angeles, State of California, and pursuant to laws of the State of California charged with the duty of enforcing the laws within said County, including the apprehension and arrest of persons reasonably believed to be in violation of Section 311.2 of the Penal Code of the State of California.

6. That at all times mentioned in petitioners' complaint, Thomas C. Lynch was, and now is, the Attorney General of the State of California.

7. That at all times mentioned in petitioners' complaint, the Board of Police Commissioners of the City of Los Angeles was, and now is, a department of the City of Los Angeles exercising a governmental function and charged with the control and management of the Police Department of the City of Los Angeles, and the exclusive authority to grant or revoke permits to engage in the arcade business within the territorial limits of the City of Los Angeles.

8. That The Municipal Court of the Los Angeles Judicial District is an aggregate body consisting of forty-nine judges for the consideration and action on matters of judicial business.

9. That The Municipal Court of the Beverly Hills Judicial District is an aggregate body consisting of two judges for the consideration and action on matters of judicial business.

10. That petitioner, Harry Schackman, was at all times mentioned in petitioners' complaint, and now is,

licensed by the City of Los Angeles to conduct an arcade business; said permits having been issued by the respondent Board of Police Commissioners of the City of Los Angeles.

11. That petitioner, Harry Schackman, since 1958, has demanded that respondent Board or respondent William H. Parker provide petitioner with a Board of Review to pass on the obscenity or non-obscenity of films displayed by petitioner in his business establishment. That in addition said petitioner has demanded that respondent Board and/or respondent Parker provide him with guidelines or opinions as to which, if any of the films displayed by petitioner were improper to exhibit and to give petitioner notice and an opportunity to defend or remove said objectionable films from sale or exhibition to the public before any arrest was to be made or any criminal complaint filed. Respondents Board and Parker refused, and still refuse, to do any or all of the foregoing as demanded by petitioner Schackman.

12. That since January, 1965, petitioner Harry Pinch has demanded that respondent Peter J. Pitchess provide petitioner with a Board of Review to pass on the obscenity or non-obscenity of films displayed by him in his business establishment. That in addition said petitioner has demanded that respondent Pitchess provide him with guidelines or opinions as to which, if any, of the films displayed by the petitioner were improper to exhibit and to give petitioner notice and an opportunity to defend or remove said objectionable films from sale or exhibition to the public before any arrest was to be made or any criminal complaint filed. Respondent

Pitchess refused, and still refuses, to do any or all of the foregoing as demanded by petitioner Pinch.

13. That Harry Schackman was arrested on or about September 30, 1961, and prosecuted in the respondent Municipal Court of the Los Angeles Judicial District as the owner and permittee at 522 South Main Street for violation of Penal Code Section 311.2 and health and fire ordinances. That said complaint charged violations of Penal Code Section 311.2 and Los Angeles Municipal Code Sections 39.04 (unclean and filthy premises); 39.50(c) (unsanitary place of public amusement); 39.50(b) (unsanitary equipment); 57.10.2 (no fire egress); 57.10.23(a) (no fire exit sign); 57.04.03 (no fire permit); that convictions were obtained on all counts and petitioner Harry Schackman sentenced for violation of Penal Code Section 311.2 and the Los Angeles Municipal Code Sections 39.05, 57.10.02, 57.10.23(a) and 57.04.03. On appeal, the conviction was reversed as to Section 311.2, but affirmed as to the other counts.

14. That Nathan DeLuca, Joseph Gross and Harry Schackman were arrested on or about November 3, 1965, for violation of Penal Code Section 311.2 at 518 and 522 South Main Street, Los Angeles, California. That complaints were filed in the respondent Municipal Court of the Los Angeles Judicial District in this connection and convictions were obtained against all defendants on January 6, 1966; appeals have been filed in this connection, but not ruled upon as yet by the Appellate Court.

15. That in connection with the prosecution of Harry Schackman, et al., arising from the arrest of September

30, 1961, and November 3, 1965, members of the staff of the City Attorney's office had reviewed the material involved and the manner in which such material was purveyed to the public prior to any arrest, as set forth more fully in paragraph 18, and were of the opinion that such material was obscene and that the persons conducting such premises were in violation of the law.

16. That neither William H. Parker, nor Roger Arnebergh, nor the Board of Police Commissioners took any part in the arrest or prosecution of the petitioners in Beverly Hills as alleged in petitioners' complaint on file herein.

17. That neither Peter J. Pitchess nor Thomas C. Lynch took any part in the arrest or prosecution of the petitioners in Los Angeles as alleged in petitioners' complaint on file herein.

18. That the procedures followed by William H. Parker, Chief of Police; Roger Arnebergh, City Attorney; the Los Angeles Police Department and the City Attorney's office are;

That matters involving alleged violation of Penal Code Section 311.2 are submitted to the Assistant City Attorney in charge of the deputies of the Criminal Division and to members of the City Attorney's staff who are informed of and cognizant of the law pertaining to obscenity and the procedures provided by law for the enforcement thereof, as well as the constitutional guarantees of freedom of speech and press, and the requirements of due process as interpreted and delineated by the Supreme Court of California and the United States Supreme Court.

That where the subject matter of the material submitted by an officer concerns books or other publications or the exhibition or sale of film, the alleged offending matter generally will be examined by the office of the City Attorney, as mentioned in paragraph 18 prior to any arrest and a decision made as to its character for purpose of issuing or refusing a complaint. Thereafter, a police officer making an arrest is armed both with his own knowledge of its character, and has reinforced this opinion by submission of it to a quasi judicial arm of the court process.

That warrants of arrest are often used, especially where the offense will not be repeated just prior to the arrest, or the arrest can only be made at a time substantially subsequent to the offense.

That search warrants are used under circumstances where contraband material is known to be present in large quantities or where the obscene material is not readily available, as in the case where obscene pictures are kept hidden but proof of their character and location is known.

19. That the jurisdiction of the Police Department of the City of Los Angeles does not include the City of Beverly Hills; that neither Roger Arnebergh, nor William H. Parker, nor the Board of Police Commissioners participated in any manner in the arrests of the petitioners, Harry Pinch, Joseph Touart or Charles Strieby, nor in the prosecution of said persons.

20. That the petitioner Harry Pinch was, and now is, engaged in the business of conducting an arcade, in the same manner as petitioner Harry Schackman. Further-

more, petitioners Charles Gary Strieby and Joseph Richard Touart are employees of petitioner Harry Pinch.

21. That Harry Pinch and Charles Gary Strieby were arrested on or about April 23, 1965, for a violation of Penal Code Section 311.2 in the unincorporated territory of Los Angeles County by members of the Sheriff's Department of the County of Los Angeles and thereafter prosecuted in the Municipal Court of the Beverly Hills Judicial District in Cases No. 14168 and 14169 by deputies in the office of the District Attorney of Los Angeles County. At the conclusion of said trial, Harry Pinch and Charles Gary Strieby were adjudged guilty of exhibiting obscene matter, to wit: The film, D-15, in violation of Section 311.2 of the Penal Code of the State of California. Said convictions were affirmed on appeal by the Appellate Department of the Superior Court of the County of Los Angeles in Case No. CRA-6539 and CRA-6540.

22. That Harry Pinch and Joseph Richard Touart were arrested on or about February 24, 1966, by members of the Los Angeles County Sheriff's Department for a violation of Section 311.2 of the Penal Code of the State of California in the unincorporated territory of Los Angeles County. The trial of said case is presently pending in the Municipal Court of the Beverly Hills Judicial District as Cases No. 15694 and No. 15701, and involves the obscenity of the film E-44, "Susan."

23. That the procedures followed by Peter J. Pitchess, Sheriff of Los Angeles County and Evelle J. Younger, District Attorney for the County of Los Angeles are as follows:

With respect to the arrest of those exhibiting alleged obscene films and materials, a Deputy Sheriff personally reviews the films or material and either purchases a copy of said film, or material, or makes notes of that which he has seen. The Deputy Sheriff then takes either the copy of the film or material or the notes to the District Attorney's office for review by a Deputy District Attorney. If, in the opinion of the Deputy District Attorney and the Deputy Sheriff involved, the films or material are obscene as defined by law, the Deputy Sheriff swears out a complaint against the exhibitor of the films or materials and obtains a Warrant of Arrest for the defendant named in the complaint. The Deputy then proceeds to arrest the defendant who has exhibited the allegedly obscene film or other material and as an incident to said arrest, either with or without a search warrant, the Deputy picks up the film or material which is the subject matter of the complaint. Only those films specifically designated in the search warrant or the complaint are seized.

24. That at all times mentioned in petitioners' complaint it was, and it now is, the intention of each of the respondents to fulfill the duties of their respective offices in strict compliance with all legal requirements as contained in the Constitution and laws of the state and nation, and in conformity with court decrees.

25. That at all times mentioned in petitioners' complaint, the respondents, and each of them, acted without malice and in the lawful performance of the duties of their respective offices.

26. No respondent performed any wrongful act which proximately caused injury or damage to petitioners or any of them.

27. That procedures are provided by California statutes which furnish standards and guidelines for the apprehension, arrest and prosecution of public offenses committed therein, including violations of Penal Code Section 311.2, which procedures were followed in the arrests and prosecutions of petitioners herein.

28. That the respondent Thomas G. Lynch did not participate in any of the arrests and prosecutions, or threatened arrests and prosecutions mentioned in petitioners' complaint on file herein.

29. That it was stipulated by and between the parties through their respective counsel, that all motions to dismiss may be treated as motions for summary judgment.

30. The film, O-12, referred to in Paragraph 7 of petitioners' complaint and introduced as Exhibit 1, was viewed by the court. The film consists of a female model clothed in a white blouse open in the front, a half-bra which exposes the upper half of the breasts including the nipples and a pair of white capri pants (which are soon discarded) under which the model wears a pair of sheer panties through which the pubic hair and region are clearly visible. The film consists of the model moving and undulating upon a bed, moving her hands, lips and torso, all clearly indicative of engaging in sexual activity, including simulated intercourse and invitations to engage in intercourse. There is no music, sound, story line or dancing other than exaggerated body movements. On at least three occasions, the female by lip articulation is

observed to state, "fuck you", "fuck me". The dominant theme of the film, taken as a whole, obviously is designed to appeal to the prurient interest in sex of the viewer and is patently offensive in that the focus of the camera returns again and again to the genital and rectal area clearly showing the pubic hair and the outline of the external parts of the female genital area. The film is entirely without artistic or literary significance and is utterly without redeeming social importance.

31. The film, 0-7, referred to in paragraph 7 of the complaint and introduced as Exhibit 2, is virtually the same as Exhibit 1. The model wears a garter belt and sheer transparent panties through which the pubic hair and external parts of the genitalia are clearly visible. For at least the last one-half of the film, the breasts are completely exposed. At one time the model pulls her panties down so that the pubic hair is exposed to view. Again, the focus of the camera is emphasized on the pubic and rectal region and the model continuously uses her tongue and mouth to simulate a desire for, or enjoyment of, acts of a sexual nature. The dominant theme of the film, taken as a whole, appeals to a prurient interest in sex of the viewer and is patently offensive in its emphasis on the genital and rectal areas, clearly showing the pubic hair and external parts of the female genital area. The film is entirely without artistic or literary significance and is utterly without redeeming social importance.

32. The parties stipulated that the film, D-15, referred to in paragraphs 7 and 10 of the petitioners' complaint and introduced as Exhibit 3, is substantially the same in character and quality as the films introduced as Exhibits

1 and 2. The court therefore finds that as to Exhibit 3, the dominant theme of the film, taken as a whole, appeals to a prurient interest in sex of the viewer and is patently offensive and is utterly without redeeming social importance.

33. The film E-44 "Susan", referred to in paragraph 11 of the petitioners' complaint and introduced as Exhibit 4, is virtually the same as Exhibits 1, 2 and 3. In addition, the model uses her hands, fingers, lips and tongue to simulate an act of oral copulation. Again, the pubic hair is visible together with the external parts of the genitalia and the focus of the camera emphasizes this area. The model continuously simulates acts of a sexual nature, including sexual intercourse and invitations to engage in such activity. The dominant theme of the film, taken as a whole, is to the prurient interest in sex of the viewer. It is patently offensive and is utterly without redeeming social importance.

34. The film known as Exhibit 19, of the Los Angeles Municipal Court Case No. 150754, referred to in paragraph 4 of the complaint and introduced as Exhibit 5, was viewed by the Court. The Court finds Exhibit 5 to be not quite as repugnant nor flagrant an example as Exhibits 1 through 4. In Exhibit 5, the pubic hair cannot be seen and the simulation of sexual intercourse is not as patent. Still, the model moves her body and hands in obviously sexual ways to simulate sexual activities and the camera's focus again emphasizes the pubic and rectal regions. The dominant theme of the film, taken as a whole, is to a prurient interest in sex of the viewer. It is patently offensive and is utterly without redeeming social importance.

35. The films, PD-11, No. 3, No. 03 and No. 119, referred to in paragraph 25 of the complaint, were introduced as Exhibits 6a, 6b, 6c and 6d respectively, and viewed by the court. These films are virtually the same as Exhibits 1 through 4, with the same uncovering of the physical attributes of the model, the camera's emphasis on the pubic and rectal area, the simulated acts of a sexual nature and invitation to engage in such activity, and the use of the tongue or mouth to indicate a desire for, or enjoyment of, acts of a sexual nature. The dominant theme of the films, taken as a whole, is to the prurient interest in sex of the viewer. They are patently offensive and utterly without redeeming social importance.

36. The films, J-12 "Anita Stein," J-16 "Sharon," Z-1 "Zebra Girl," and E-41 "Kitty Kane," referred to in paragraph 25 of the complaint, were introduced as Exhibits 7a, 7b, 7c and 7d respectively, and viewed by the court. The films are virtually the same as Exhibits 1 through 4, with the same uncovering of the physical attributes of the model, the camera's emphasis on the pubic and rectal area, the simulated acts of a sexual nature and invitation to engage in such activity, and the use of the tongue or mouth to indicate a desire for, or enjoyment of, acts of a sexual nature. The dominant theme of the films, taken as a whole, is to the prurient interest in sex of the viewer. They are patently offensive and utterly without redeeming social importance.

37. That the only agreement among any of the respondents herein was, and is, to prosecute any person whom they reasonably believe to be in violation of Section 311.2 of the Penal Code of the State of California.

38. That no respondent entered into any conspiracy or scheme to enforce Penal Code Section 311.2 or any other law in any illegal, wrongful or arbitrary manner.

39. That the respondents and each of them, acted in good faith under color of State law at all times mentioned in petitioners' complaint.

40. That the allegations contained in petitioners' complaint, inconsistent with the Findings of Fact herein, are untrue.

41. The following Conclusions of Law, insofar as they may be concluded Findings of Fact are so found by this court to be true in all respects. From the foregoing facts the court concludes:

CONCLUSIONS OF LAW

1. That no respondent did under color of any statute, ordinance, regulation, custom or usage, subject or cause to be subjected the petitioners, or any of them, to the deprivation of any rights, privileges or immunities secured by the Constitution or laws of the United States or of the State of California.

2. That no respondent conspired to abridge or deny to petitioners, or any of them, any of the rights, privileges or immunities secured by the Constitution or laws of the United States or State of California, or any of the civil rights of petitioners or any of them, or deny to petitioners or any of them equal protection of the laws.

3. That neither the Board of Police Commissioners of the City of Los Angeles, nor The Municipal Court of the Beverly Hills Judicial District, nor the Municipal

Court of the Los Angeles Judicial District are "persons" within the purview and meaning of 42 U.S.C. Sections 1981 through 1985, and 1988.

4. That no statute of California requires a judicial determination of obscenity as a condition precedent to the institution in good faith, of a complaint and/or arrest for violation of the state obscenity laws, nor is such requirement found in the First or Fourteenth Amendment to the Constitution of the United States.

5. That the procedures provided by California law for the arrest and prosecution of persons charged with violation of California Penal Code, Section 311.2 and which procedures were followed by respondents, and each of them, do not and did not abridge or deny to petitioners, or any of them, any of the rights, privileges or immunities secured to them by the Constitution of the United States, nor deny to them, or any of them, due process or equal protection of the law, nor deprive petitioners, or any of them, of any of their civil rights.

6. That the respondents, and each of them, are immune from suit under the Civil Rights Act for conduct in the performance of their official duties in good faith.

7. No respondent performed any wrongful or illegal act.

8. No respondent entered into a conspiracy to perform an illegal or wrongful act.

9. The respondents, and each of them, could and did have reasonable cause to believe that each of the films mentioned in petitioners' complaint were within the ambit and purview of said Penal Code Section 311.2 and as such prosecutable.

10. The respondents Roger Arnebergh and William Parker, acted reasonably and upon probable cause that Exhibit 1, the film, O-12, violated Section 311.2 of the Penal Code of the State of California. The film, O-12, reasonably comes within the ambit and purview of the material prohibited by Section 311.2 of the Penal Code of the State of California and the prosecution of petitioners Harry Schackman, Joseph Gross and Nathan DeLuca did not deprive them of any of their rights, privileges or immunities secured by the Constitution and laws of this State or nation.

11. The respondents, Roger Arnebergh and William Parker, acted reasonably and upon probable cause that Exhibit 2, the film, O-7, violated Section 311.2 of the Penal Code of the State of California. The film, O-7, reasonably comes within the ambit and purview of the material prohibited by Section 311.2 of the Penal Code of the State of California and the prosecution of petitioners Harry Schackman, Joseph Gross and Nathan DeLuca did not deprive them of any of their rights, privileges or immunities secured by the Constitution and laws of this State or nation.

12. The respondents, Roger Arnebergh, William Parker, Evelle J. Younger and Peter J. Pitchess, acted reasonably and upon probable cause that Exhibit 3, the film, D-15, violated Section 311.2 of the Penal Code of the State of California. The film, D-15, reasonably comes within the ambit and purview of the material prohibited by Section 311.2 of the Penal Code of the State of California and the prosecution of petitioners Harry Schackman, Joseph Gross, Nathan DeLuca, Harry Pinch and Charles Gary Strieby, did not deprive them of their rights,

privileges or immunities secured by the Constitution or laws of this State or nation.

13. The respondents, Evelle J. Younger and Peter J. Pitchess, acted reasonably and upon probable cause that Exhibit 4, the film E-44 "Susan," violates Section 311.2 of the Penal Code of the State of California. The film, E-44 "Susan," reasonably comes within the ambit and purview of the material prohibited by Section 311.2 of the Penal Code of the State of California and the prosecution of petitioners Harry Schackman and Joseph Richard Touart will not deprive them of any of their rights, privileges or immunities secured by the Constitution and laws of this State or nation.

14. The respondents, Roger Arnebergh and William Parker, acted reasonably and upon probable cause that Exhibit 5 (Exhibit 19 in The Los Angeles Municipal Court, Case No. 150754) violated Section 311.2 of the Penal Code of the State of California. Exhibit 5 reasonably comes within the ambit and purview of the material prohibited by Section 311.2 of the Penal Code and the prosecution of petitioner, Harry Schackman, did not deprive him of any of his rights, privileges or immunities secured by the Constitution and laws of this State or nation.

15. Exhibits 6a, 6b, 6c and 6d; 7a, 7b, 7c and 7d, reasonably come within the ambit and purview of the material prohibited by Section 311.2 of the Penal Code of the State of California and the respondents and each of them have reasonable and probable cause to believe said Exhibits are obscene as that term is defined by law.

16. The petitioners Harry Pinch and Charles Gary Strieby are collaterally estopped from litigating the obscenity of the film, D-15, (Exhibit 3).

17. Summary judgment should be entered in favor of all respondents dismissing the complaint on file herein upon the ground that said complaint fails to state a claim against respondents upon which relief can be granted. There is no genuine issue as to any material fact relating to this action and respondents and each of them are entitled to judgment against petitioners as a matter of law.

18. That the acts and conduct of the respondents, Roger Arnebergh, Evelle J. Younger, William H. Parker, Thomas J. Lynch, and Peter J. Pitchess, with respect to the matters alleged in the complaint, were within the scope and course of their authority, duties, responsibilities as City Attorney, District Attorney, Chief of Police, Attorney General, and Sheriff, respectively.

19. That after viewing the films referred to in petitioners' complaint, this court is of the opinion that there is reasonable and probable cause to believe said films are obscene and in violation of Section 311 et seq. of the California Penal Code and that since said films are incorporated into the complaint by reference, the complaint does not even formally allege a basis for equitable relief under 28 USCA 2281 et seq., and therefore, petitioners' application for the convocation of a three judge Federal Court is denied. (*Idlewild Liquor Corp. v. Epstein,* (1961) 370 US 713).

20. The court has viewed the films referred to in petitioners' complaint and is of the opinion that there is reasonable and probable cause to believe said films are

obscene and in violation of Section 311.2 et seq. of the California Penal Code, and therefore the court in the exercise of its discretion, declines to grant petitioners' declaratory relief. Petitioners have an adequate remedy under state law. (*Zeitlin v. Arnebergh* (1963), 59 Cal. 2d 901).

21. Neither respondents Pitchess nor Parker nor the Board of Police Commissioners are required by law to provide petitioners with a Board of Review to pass upon the obscenity or non-obscenity of the films displayed by the petitioners in their business establishments.

22. Neither respondents Pitchess, Parker, nor the Board of Police Commissioners are required by law to provide petitioners with opinions or guidelines as to which, if any, of the films displayed by petitioners are improper, nor are any of the respondents required to give petitioners notice and opportunity to remove or defend objectionable films prior to the making of any arrest or the filing of a criminal complaint.

23. The court concludes as a matter of law that it had and has the power to dismiss this action and grant summary judgment; and that, after reviewing all of the pleadings, exhibits to the pleadings consisting of the various films, admissions, affidavits and all of the matters before this court during the two day hearing, it is the court's duty to dismiss this action by granting summary judgment in favor of all of the respondents.

24. For the same reasons the court concludes as a matter of law that dismissal by the granting of the motion for summary judgment is the court's duty to perform by

itself as a single-judge court and that a three-judge court should not be convened.

25. Additionally, the court concludes as a matter of law that it has the power and duty to decide this matter as a single-judge court without convening a three-judge court because, after having reviewed all of the pleadings, exhibits to the pleadings, admissions, affidavits and all of the matters before this court during the hearing, there is no substantial Federal question which requires the convening of a three-judge court under 28 USC Section 2281. *Smith v. California,* (1964) 336 F.2d 530, 534; *Pierre v. Jordan,* (1964) 333 F.2d 951, 956-957; *Blue and Gold Stamps v. Sobieski,* (1961) 190 F.Supp. 133, 134-135; *Ex Parte Poresky,* (1933) 290 US 30, 31-32; *Idlewild Liquor Corp. v. Epstein,* (1961) 370 US 713, 715.

26. The court viewed at length and completely and in toto each and every one of the films which are incorporated into the complaint as exhibits and which were the subject matter of the criminal prosecution complained of by petitioners as alleged deprivations of their civil rights in violation of the Civil Rights Acts (42 USC 1981-1985, 1988). The court concludes as a matter of law that the exhibits and each of them are clearly, unequivocally and incontrovertibly obscene and pornographic in the hard core sense because they come within the reasonable purview and ambit of both the Federal judicial definition of obscenity and hard core pornography *(Roth v. U.S.* (1957) 354 U.S. 476; *Mishkin v. New York* (1966) 383 U.S. 502; *Ginzberg v. U.S.* (1966) 383 U.S. 463, and the California statutory definition of obscenity and hard core pornography (California Penal Code Section

311, *Zeitlin v. Arnebergh,* (1963) 59 Cal.2d 901, so that it is impossible for the court to find any substantial Federal question by way of a deprivation of any civil or constitutional right, whether protected by the Federal Civil Rights Acts (42 U.S.C. 1981-1985) or by the First, Fourth or Fourteenth Amendments to the Constitution of the United States.

JUDGMENT SHALL BE ENTERED ACCORDINGLY GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS AND DISMISSING THE ACTION AS TO EACH AND ALL OF THEM.

DATED: This 27th day of September, 1966.

A. ANDREW HAUK

United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

WILLIAM PINKUS,

Petitioner,

vs.

ROGER ARNEBERGH, City Attorney for the City of Los Angeles; EVELLE J. YOUNGER, District Attorney for the City of Los Angeles; WILLIAM H. PARKER, Chief of Police for the City of Los Angeles; PETER J. PITCHESS, Sheriff of the County of Los Angeles; THOMAS C. LYNCH, Attorney General for the State of California; MUNICIPAL COURT OF BEVERLY HILLS JUDICIAL DISTRICT, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA,

Respondents.

FILED
SEP 27 1966
Clerk, U.S.
District Court
Central District
of California
By *Deputy*

ENTERED
SEP 27 1966
Clerk, U. S.
District Court
Central District
of California
By *Deputy*

No. 66-861-AAH
DECISION, FINDINGS OF FACT and CONCLUSIONS OF LAW

Complaint for declaratory judgment and injunction in which petitioner, following an increasingly apparent trend of smut peddlers under vigorous attack by city, county and state law enforcement, invoke the aid of the Federal Courts by seeking refuge in the Federal civil rights statutes enacted in the post-Civil War and Reconstruction Period for the protection of Negro civil and constitutional rights.

Petitioner seeks the empanelment of a three-judge court; a declaration that the films and magazines exhibited and sold by him were and are not obscene or hard core pornography; a further declaration that his prosecutions, actual and threatened, were and are violations of petitioner's civil and constitutional rights; and

injunctive relief restraining respondent City, County and State courts and law enforcement agencies and officers from actual and threatened prosecutions.

Upon petitioner's motion for preliminary injunction and respondents' motions for summary judgment and motions to dismiss (here treated as motions for summary judgment), the Court refused to empanel a three-judge court; denied the declaratory and injunctive relief sought by petitioner; and granted summary judgment in favor of all respondents. In so doing the Court held that the films and magazines were clearly obscene and constituted hard core pornography; that petitioner was not deprived of any civil or constitutional rights; and that the City, County and State courts and law enforcement agencies and officers should not be restrained from prosecuting petitioner for exhibiting and selling the films.

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Burton Marks, Beverly Hills, California, for petitioner.

Harold W. Kennedy, County Counsel, by Irvin C. Taplin, Jr., Deputy County Counsel, Los Angeles, California, for respondents Evelle J. Younger, Los Angeles County District Attorney, and Beverly Hills Municipal Court;

Roger Arnebergh, City Attorney, Robert B. Burns, Assistant City Attorney, by George J. Franscell, Deputy City Attorney, Los Angeles, California, for respondents Los Angeles City Attorney Roger Arnebergh, Los Angeles City Chief of Police William H. Parker, Los Angeles Board of Police Commissioners;

Thomas C. Lynch, Attorney General, by A. Barry Cappello, Deputy Attorney General, Los Angeles, California, for respondent California State Attorney General Thomas C. Lynch.

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This is an action for declaratory judgment and injunction brought by the owner and operator of a so-called "arcade" establishment in the unincorporated territory of Los Angeles County, California, where petitioner exhibits and sells "nudie" motion picture films and "nudist" magazines. The method of operation is to exhibit the films in small booths, utilizing "peep show" machines which are activated when customers deposit silver coins for metered showings measured in terms of minutes proportionate to the value of the coins deposited. After viewing the films, the customers can later purchase them in the same place where the "nudist" magazines may also be viewed and purchased.

Petitioner has been prosecuted and convicted by respondents for violation of California Penal Code §311 and §311.2, the State obscenity statute,[1] and now proceed

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[1] California Penal Code 311

"§ 311. *Definitions*

As used in this chapter:

(a) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance.

(b) 'Matter' means any book, magazine, newspaper or other printed or written material or any picture, drawing, photograph,

under the Federal Civil Rights Acts (42 U.S.C. 1981-1985, 1988) seeking the empanelment of a three-judge Federal Court (28 U.S.C. 2281-2284) for a declaration that the films and magazines were not obscene as a matter of law and that the enforcement, operation and execution of the California obscenity statute has deprived and will continue to deprive petitioner of his civil and constitutional rights protected by the First (freedom of speech), Fourth (freedom from unreasonable searches and seizures), and Fourteenth (equal protection of the laws) Amendments of the United States Constitution. Additionally, petitioner also seeks injunctive relief against the various respondent court and law enforcement agencies and officers of City, County and State to prohibit them from conducting such prosecutions, together with an order compelling the law enforcement agencies and officers to set up a pre-prosecution censorship system to

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1 (continued)

motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

(c) 'Person' means any individual, partnership, firm, association, corporation, or other legal entity.

(d) 'Distribute' means to transfer possession of, whether with or without consideration.

(e) 'Knowingly' means having knowledge that the matter is obscene."

"§ 311.2. *Sending or bringing into state for sale or "distribution; printing, exhibiting, distributing or possessing within state*

"Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State prepares, publishes, prints, exhibits, distributes or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor."

which petitioner could submit future films and magazines for a determination as to obscenity prior to exhibiting and selling them.

Originally coming on for hearing upon petitioner's motion for a preliminary injunction and respondents' motions to dismiss the complaint and motions for summary judgment, extensive evidence was presented by both sides and received by the Court at hearings which ran for four days, including the films and magazines themselves, which were marked as exhibits and viewed by the Court in their entirety throughout lengthy and eventually boring sessions. Detailed and comprehensive affidavits were submitted by respondents covering all stages of the law enforcement procedures followed in the prosecutions of petitioner. Because of this receipt of evidence and by stipulation of the parties the motions to dismiss were treated as motions for summary judgment, all parties having been given reasonable opportunity to present all material pertinent to the issues. Rule 12(b) and Rule 56, *Federal Rules of Civil Procedure*. *Moss v. Hornig*, 214 F.Supp. 324, 330-331 (D. Conn. 1962); *North American Iron and Steel Co. v. United States*, 130 F.Supp. 723, 724 (E.D. N.Y. 1955); *Hibben v. Kuchaj*, 117 F.Supp. 55, 56 (N.D. Ill. 1953).

After full consideration of the pleadings and the evidence submitted by the parties, after hearing all arguments by the parties, and after full consideration of the points and authorities presented to the Court in support of the respective positions of the petitioner and the respondents, the Court now makes its decision, findings of fact and conclusions of law that petitioner's application for a convocation of a three-judge Federal Court be denied,

and that summary judgment be entered in favor of respondents.

So that the facts will be clear and the findings incontestably correct, the Court must describe in detail the films and magazines which it viewed, and the actions and gyrations of the female models and actresses in the films, and of the male and female models, actors and actresses in the magazines, whose duplicating displays of obscenity and pornography are the central and only themes of these tiresome titillations.

FINDINGS OF FACT

1. That the respondent William H. Parker was the Chief of Police of the City of Los Angeles and had been a member of and the General Manager and Chief Administrative Officer of the Police Department of the City of Los Angeles, which Department has the powers and duty of enforcing the laws of the State of California within the territorial limits of the City of Los Angeles, including the apprehensive and arrest of persons reasonably believed to be in violation of Penal Code Section 311.2.

2. That William H. Parker died on July 16, 1966.

3. That the respondent, Roger Arnebergh, was and now is, City Attorney for the City of Los Angeles and at all times mentioned in petitioner's complaint, said respondent was and now is, the duly elected and acting City Attorney of the City of Los Angeles, empowered and required by the Charter of the City of Los Angeles to prosecute any and all misdemeanor offenses occurring within the territorial limits of the City of Los Angeles, including prosecution of Penal Code Section 311.2, a misdemeanor offense.

4. That at all times mentioned in petitioner's complaint, respondent, Evelle J. Younger, was and now is, the duly elected and acting District Attorney for the County of Los Angeles, State of California, empowered and charged with the duty of prosecuting any and all felonies within said county and any and all misdemeanor offenses occurring within the unincorporated territory of said County, including prosecution of Penal Code Section 311.2, a misdemeanor offense.

5. That at all times mentioned in petitioner's complaint, respondent Peter J. Pitchess, was and now is, the duly elected and acting Sheriff of the County of Los Angeles, State of California, and pursuant to laws of the State of California charged with the duty of enforcing the law within said County, including the apprehension and arrest of persons reasonably believed to be in violation of Section 311.2 of the Penal Code of the State of California.

6. That at all times mentioned in petitioner's complaint, Thomas J. Lynch was, and now is, the Attorney General of the State of California.

7. That The Municipal Court of the Beverly Hills Judicial District is an aggregate body consisting of two judges for the consideration and action on matters of judicial business.

8. That petitioner, William Pinkus, was at all times mentioned in petitioner's complaint, and now is, licensed by the County of Los Angeles to conduct an arcade business pursuant to a permit issued by respondent Peter J. Pitchess, Sheriff of Los Angeles County and petitioner William Pinkus is, and at all times mentioned in the com-

plaint, was engaged in the business of selling books and magazines in the City and County of Los Angeles.

9. That petitioner William Pinkus, since April, 1964, has demanded that respondent Peter J. Pitchess provide petitioner with a Board of Review to pass on the obscenity or non-obscenity of films displayed by petitioner in his business establishment. That in addition said petitioner has demanded that respondent Peter J. Pitchess provide him with guidelines or opinions as to which, if any, of the films displayed by petitioner were improper to exhibit and to give petitioner notice and an opportunity to defend or remove said objectionable films from sale or exhibition to the public before any arrest was to be made or any criminal complaint filed. Respondent Peter J. Pitchess refused and still refuses, to do any or all of the foregoing as demanded by petitioner William Pinkus.

10. That petitioner, William Pinkus, and one of his employees, were arrested pursuant to a Warrant of Arrest issued by respondent Municipal Court of the Beverly Hills Judicial District on or about May 12, 1964, for a violation of California Penal Code Section 311.2, (exhibiting obscene material) in the unincorporated territory of Los Angeles County, by members of the Sheriff's Department of the County of Los Angeles and thereafter prosecuted in the Municipal Court of the Beverly Hills Judicial District in Case No. M12706 and M12707 by Deputies in the Office of the District Attorney of Los Angeles County. At the conclusion of said trial, petitioner was adjudged guilty of exhibiting obscene matter, to wit, the motion picture films identified in said cases, Exhibits 1 and 2, and 56 rolls of other film stipulated as being the same

quality and character as Exhibits 1 and 2, in violation of California Penal Code Section 311.2. Said convictions were affirmed on appeal by the Appellate Department of the Los Angeles Superior Court in Cases No. CRA-6101 and CRA-6102. Subsequent to said affirmance, petitioner applied for and was granted a stay of execution of sentence for the purpose of permitting petitioner to apply for a writ of certiorari to the United States Supreme Court. To date petitioner has not applied for said writ of certiorari.

11. That petitioner, William Pinkus, was arrested pursuant to a Warrant of Arrest issued by respondent, Municipal Court of the Beverly Hills Judicial District, on or about April 6, 1966, for a violation of California Penal Code Section 311.2, (exhibiting and selling obscene material) in the unincorporated territory of Los Angeles County by members of the Sheriff's Department of the County of Los Angeles. The trial of said case is presently pending in the Municipal Count of the Beverly Hills Judicial District as Case No. M15968, and the materials involved therein are the magazines "Jay Bird Journal," and "Film and Figure #3."

12. That the jurisdiction of the Police Department and the City Attorney of the City of Los Angeles does not include the City of Beverly Hills nor the unincorporated territory of Los Angeles County. That neither Roger Arnebergh nor William Parker, participated in any manner in the arrests and prosecution of petitioner William Pinkus as set forth in Findings No. 10 and 11.

13. With respect to the arrest and prosecution of those suspected of violating California Penal Code Section

311.2, the procedures followed by respondents Peter J. Pitchess, Sheriff of the County of Los Angeles and Evelle J. Younger, District Attorney of the County are as follows:

> With respect to the arrest of those exhibiting alleged obscene films and materials, a Deputy Sheriff personally reviews the films or material and either purchases a copy of said film, or material, or makes notes of that which he has seen. The Deputy Sheriff then takes either the copy of the film or material or the notes to the District Attorney's office for review by a Deputy District Attorney. If, in the opinion of the Deputy District Attorney and the Deputy Sheriff involved, the films or material are obscene as defined by law, the Deputy Sheriff swears out a complaint against the exhibitor of the films or material and obtains a Warrant of Arrest for the defendant named in the complaint. The Deputy then proceeds to arrest the defendant who has exhibited the allegedly obscene film or other material and as an incident to said arrest, either with or without a search warrant, the Deputy picks up the film or material which is the subject matter of the complaint. Only those films specifically designated in the search warrant or the complaint are seized.

14. The films referred to in Paragraph 4 of petitioner's complaint, and identified as Exhibits 1 and 2 in Case No. M12706 and M12707, were introduced as Exhibits 1 and 2 respectively and viewed by the Court. These Exhibits depict a female in each, nude except for leg-length tights on one and a filmy pair of panties on the other, covering the vaginal area through which the pubic hair was visible. The films consist of the model

moving and undulating upon a bed or couch, moving her hands, lips or body, all clearly indicative of engaging in sexual activity, including simulated intercourse and invitations to engage in intercourse. There is no music, sound, story line or dancing other than exaggerated body movements. Again and again the focus of the camera returns to the vaginal and rectal areas clearly showing the pubic hair and the outline of the external portions of the female genital area. On other occasions, the focus of the camera emphasizes the nude breasts of the model. The dominant theme of the films, taken as a whole, is to the prurient interest in sex of the viewer and they are patently offensive in their emphasis of the vaginal, rectal and breast areas and the exaggerated movements of the model. The films are entirely without artistic or literary significance and are utterly without redeeming social importance.

15. The magazines, "Jay Bird Journal," and "Film and Figure #3," referred to in Paragraph 5 of the petitioner's First Cause of Action and Paragraph 2 of the petitioner's Second Cause of Action, were introduced as Exhibits 3, 4 and 5 (Exhibits 3 and 4 being two different issues of "Jay Bird Journal"). Exhibits 3 and 4 consist of numerous and sundry obviously posed pictures of nude women, nude men and women and nude groups of men and women with the focus in most instances on the genital area of the models. The breasts and pubic areas are clearly shown on the female models and the penis of the male model is clearly shown. In some pictures, the female models appear to be shaven so that the external portions of the vaginal area are exposed. In many poses, it appears that the female models intentionally assumed

positions requiring them to spread their legs apart to emphasize the genital area. The articles in the magazine are innocuous, dreary and purile and bear little if any, relationship to the illustrations. Typical is Exhibit 3, wherein forty-one of its sixty-three pages contain pictures of nude females, males and mixed groups. The remaining twenty-two pages consist of an article regarding the granting of mailing privileges to nudist magazines, complete with pictures of various nudes from those magazines, an article on "Topless Barmaids," containing numerous pictures of the same, and a three-page article on Rubens, the painter. There are also three pages of advertising for other nudist publications, together with order forms therefore, and a four-page article on censorship in the past. Exhibit 5 consists of a picture book of nude or almost nude women. In almost every picture, the breasts and pubic area are fully exposed. Again, some models appear shaven so that the external portions of the vaginal area are exposed, and the models in many instances assume positions requiring them to spread their legs to emphasize the vaginal area. Also the pictures are obviously posed and, although posed in an outdoor setting, few of the models are engaged in any normal outdoor activity. The obvious appeal of Exhibits 3, 4 and 5, taken as a whole, is to the prurient interest in sex of the reader. They are patently offensive and utterly without redeeming social importance.

16. The films, "Erika Von Kessler," "Lilith," "Susanne Lange," and "Carol Turner," referred to in Paragraph 2 of petitioner's Second Cause of Action, were introduced as Exhibits 6a, 6b, 6c and 6d respectively, and viewed by the court. Each film, in black and white

photography, portrays a series of individual female models in various positions on beds, couches, chairs and on the floor. Each film follows a pattern wherein the model goes through the process of undressing from a state of partial nudity to complete nudity. During the process, the uncovering, massaging, and display of the bare breasts, as well as the buttocks region, is accentuated. There is no music, sound, story line or dancing other than exaggerated body movements. The films consist of models moving and undulating on the bed, couch, chair or floor, moving her hands, lips and body all clearly indicative of engaging in sexual activity, including sexual intercourse and invitations to engage in intercourse. In some of the films, the sexual activity is more flagrant in that the model is completely nude most of the time, and plays with some type of elongated powder puff in a manner clearly indicative of sexual activity. Each model, without exception, simulates the body position and movements of sexual intercourse, feigns oral copulation together with titillating movement of the lips and feigns masturbation. The movement and picture angles of the camera itself contribute to the intimacy, the drawn out sexuality and the unmistakable participation of the subjects. The obvious appeal of these films, taken as a whole, is to the prurient interest in sex of the viewer. They are patently offensive and utterly without redeeming social importance.

17. That at all times mentioned in petitioner's complaint, it was, and it now is, the intention of each of the respondents to fulfill the duties of their respective offices in strict compliance with all legal requirements as con-

tained in the Constitution and laws of the state and nation, and in conformity with court decrees.

18. That at all times mentioned in petitioner's complaint, the respondents, and each of them, acted without malice and in the lawful performance of the duties of their respective offices.

19. No respondent performed any wrongful act which proximately caused injury or damage to petitioner.

20. That procedures are provided by California statutes which furnish standards and guidelines for the apprehension, arrest and prosecution of public offenses committed therein, including violation of Penal Code Section 311.2 which procedures were followed in the arrests and prosecutions of petitioner herein.

21. That the respondent, Thomas G. Lynch, did not participate in any of the arrests and prosecutions, or threatened arrests and prosecutions mentioned in petitioner's complaint on file herein.

22. That it was stipulated by and between the parties through their respective counsel, that all motions to dismiss may be treated as mentions for Summary Judgment.

23. That the only agreement among any of the respondents herein was, and is, to prosecute any person whom they reasonably believe to be in violation of Section 311.2 of the Penal Code of the State of California.

24. That no respondent entered into any conspiracy or scheme to enforce Penal Code Section 311.2 or any other law in any illegal, wrongful or arbitrary manner.

25. That the respondents, and each of them, acted in good faith under color of state law at all times mentioned in petitioner's complaint.

26. That the allegations contained in petitioner's complaint, inconsistent with the Findings of Fact herein, are untrue.

27. The following Conclusions of Law, insofar as they may be concluded Findings of Fact, are so found by this court to be true in all respects. From the foregoing facts the court concludes.

CONCLUSIONS OF LAW

1. That the acts and conduct of the respondents Roger Arnebergh, Evelle J. Younger, William H. Parker, Thomas J. Lynch and Peter J. Pitchess, with respect to the matters alleged in the complaint, were within the scope and course of their authority, duties, and responsibilities as City Attorney, District Attorney, Chief of Police, Attorney General, and Sheriff, respectively.

2. That after viewing the films and publications referred to in petitioner's complaint, this court is of the opinion that there is reasonable and probable cause to believe said films and publications are obscene and in violation of Section 311 et seq. of the California Penal Code and that since said films and publications are incorporated into the complaint by reference, the complaint does not even formally allege a basis for equitable relief under 28 USCA 2281 et seq., and therefore, petitioner's application for the convocation of a three judge Federal Court is denied. (*Idlewild Liquor Corp. v. Epstein* 370 U.S. 713)

3. The court has viewed the films and publications referred to in petitioner's complaint and is of the opinion that there is reasonable and probable cause to believe said films are obscene and in violation of Section 311 et seq. of the California Penal Code, and therefore the court, in the exercise of its discretion, declines to grant petitioners declaratory relief. Petitioners have an adequate remedy under state law. (*Zeitlin v. Arnebergh* 59 C 2d 901)

4. That no respondent did under color of any statute, ordinance, regulation, custom or usage, subject, or cause to be subjected; the petitioner to the deprivation of any rights, privileges, or immunities secured by the Constitution or laws of the United States or of the State of California.

5. That no respondent conspired to abridge or deny to petitioner any of the rights, privileges or immunities secured by the Constitution of laws of the United States or State of California, or any of the civil rights of petitioner, or deny to petitioner equal protection of the laws.

6. That the Municipal Court of the Beverly Hills Judicial District is not a "person," within the purview and meaning of 42 U.S.C. Section 1981 through 1985.

7. That no statute of California requires a judicial determination of obscenity as a condition precedent to the institution in good faith, of a complaint and/or arrest for violation of the state obscenity laws, nor is such requirement found in the First or Fourteenth Amendment to the Constitution of the United States.

8. That the procedures provided by California law for the arrest and prosecution of persons charged with viola-

tion of California Penal Code, Section 311.2, and which procedures were followed by respondents, and each of them, do not and did not abridge or deny to petitioner any of the rights, privileges or immunities secured to him by the Constitution of the United States, nor deny to him due process or equal protection of the law, nor deprive petitioner any of his civil rights.

9. Respondent Pitchess is not required by law to provide petitioner with a Board of Review to pass upon the obscenity or non-obscenity of the films and publications exhibited and sold by petitioner in his business establishment.

10. Respondent Pitchess is not required by law to provide petitioner with opinions or guidelines as to which, if any, of the films displayed by petitioners are improper, nor are any of the respondents required to give petitioners notice and opportunity to remove or defend objectionable films prior to making of any arrest or the filing of a criminal complaint.

11. That there has been no showing of any violation of the civil or constitutional rights of petitioner by reason of his arrest and prosecution for violation of Section 311.2 of the California Penal Code with respect to Exhibits 1 and 2 nor by reason of his arrest and pending prosecution for violating Section 311.2 of the California Penal Code with respect to Exhibits 3, 4 and 5. Exhibits 1, 2, 3, 4 and 5 could reasonably be found by a court to be obscene.

12. That there is reasonable and probable cause to believe Exhibits 1, 2, 3, 4 and 5 are obscene as defined by law and the arrest and prosecution of petitioner for

exhibiting or selling said exhibits is and would be a constitutional application of a constitutional statute, to wit, Section 311.2 of the California Penal Code.

13. That there is reasonable and probable cause to believe Exhibits 6a, 6b, 6c and 6d are obscene as defined by law and the arrest or prosecution of petitioner for exhibiting or selling said exhibits would be a constitutional application of a constitutional statute, to wit, Section 311.2 of the California Penal Code.

14. That the respondents, and each of them, are immune from suit under the Civil Rights Act for conduct in the performance of their official duties in good faith.

15. That no respondent performed any wrongful or illegal act.

16. That no respondent entered into a conspiracy to perform an illegal or wrongful act.

17. The respondents, and each of them, could and did have reasonable cause to believe that each of the films mentioned in petitioner's complaint were within the ambit and purview of said Penal Code Section 311.2 and as such prosecutable.

18. The respondents, Evelle J. Younger and Peter J. Pitchess acted reasonably and upon probable cause that Exhibits 1 and 2, violated Section 311.2 of the Penal Code of the State of California. The films, Exhibits 1 and 2, reasonably come within the ambit and purview of the material prohibited by Section 311.2 of the Penal Code of the State of California and the prosecution of the petitioner, William Pinkus, did not deprive him of

any of the rights, privileges or immunities secured by the Constitution and laws of this state and nation.

19. The respondents, Evelle J. Younger and Peter J. Pitchess, acted reasonably and on probable cause that Exhibits 3, 4 and 5, "Jay Bird Journal," and "Film and Figure #3," violated Section 311.2 of the Penal Code of the State of California. The magazines, Exhibits 3, 4 and 5 reasonably come within the ambit and purview of the material prohibited by Section 311.2 of the Penal Code of the State of California. The Prosecution of petitioner, William Pinkus, will not deprive him of any of his rights, privileges or immunities secured by the Constitution and laws of this state and nation.

20. Exhibits 6a, 6b, 6c and 6d reasonably come within the ambit and purview of the material prohibited in Section 311.2 of the Penal Code of the State of California, and the respondents, and each of them, have reasonable and probable cause to believe said Exhibits are obscene as that term is defined by law.

21. The petitioner William Pinkus is collaterally estopped from litigating the obscenity of the films introduced as Exhibits 1 and 2, identified as Exhibits 1 and 2 in The Municipal Court of the Beverly Hills Judicial District as Cases No. M12706 and M12707. (*Tietelbaum Furs Inc. v. Dominion Ins., Co.* (1962) 58 C2d 601)

22. Summary Judgment should be entered in favor of all respondents dismissing the complaint on file herein upon the ground that said complaint fails to state a claim against respondents upon which relief can be granted. There is no genuine issue as to any material

fact relating to this action and respondents and each of them are entitled to a judgment against petitioner as a matter of law.

23. The court concludes as a matter of law that it had and has the power to dismiss this action and grant summary judgment; and that, after reviewing all of the pleadings, exhibits to the pleadings consisting of the various films and magazines, admissions, affidavits and all of the matters before this court during the two day hearing, it is the court's duty to dismiss this action by granting summary judgment in favor of all of the respondents.

24. For the same reasons the court concludes as a matter of law that dismissal by the granting of the motion for summary judgment is the court's duty to perform by itself as a single-judge court and that a three-judge court should not be convened.

25. Additionally, the court concludes as a matter of law that it has the power and duty to decide this matter as a single-judge court without convening a three-judge court because, after having reviewed all of the pleadings, exhibits to the pleadings, admissions, affidavits and all of the matters before this court during the hearing, there is no substantial Federal question which requires the convening of a three-judge court under 28 USC Section 2281. *Smith v. California,* (1964) 336 F.2d 530, 534; *Pierre v. Jordan,* (1964) 333 F.2d 951, 956-957; *Blue and Gold Stamps v. Sobieski,* (1961) 190 F.Supp. 133, 134-135; *Ex Parte Poresky,* (1933) 290 US 30, 31-32; *Idlewild Liquor Corp. v. Epstein,* (1961) 370 US 713, 715.

26. The court viewed at length and completely and in toto each and every one of the films and magazines which are incorporated into the complaint as exhibits and which were the subject matter of the criminal prosecution complained of by petitioners as alleged deprivations of their civil rights in violation of the Civil Rights Acts (42 USC 1981-1985, 1988). The court concludes as a matter of law that the exhibits and each of them are clearly, unequivocally and incontrovertibly obscene and pornographic in the hard core sense because they come within the reasonable purview and ambit of both the Federal judicial definition of obscenity and hard core pornography (*Roth v. U.S.* (1957) 354 U.S. 476; *Mishkin v. New York* (1966) 383 U.S. 502, *Ginzberg v. U.S.* (1966) 383 U.S. 463, and the California statutory definition of obscenity and hard core pornography (California Penal Code Section 311, *Zeitlin v. Arnebergh* (1963), 59 Cal. 2d 901), so that it is impossible for the court to find any substantial Federal question by way of a deprivation of any civil or constitutional right, whether protected by the Federal Civil Rights Acts (42 U.S.C. 1981-1985, 1988) or by the First, Fourth or Fourteenth Amendments to the Constitution of the United States.

JUDGMENT SHALL BE ENTERED ACCORDINGLY GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS AND DISMISSING THE ACTION AS TO EACH AND ALL OF THEM.

DATED: This 27th day of September, 1966.

A. ANDREW HAUK

United States District Judge

APPENDIX C

CASE No. 66-784 AAH

SCHACKMAN, et al, vs. ARNEBERGH, et al

ON MOTION FOR EXTENSION OF TIME TO FILE REPORTER'S TRANSCRIPT ON APPEAL AND TO DOCKET RECORD WITH UNITED STATES SUPREME COURT:

ORDER

It is so Ordered extended to Jan. 15, 1967.

Dated: December 2, 1966

A. ANDREW HAUK

ON MOTION FOR EXTENSION OF TIME TO FILE CLERK'S AND REPORTER'S TRANSCRIPTS ON APPEAL AND TO DOCKET RECORD WITH UNITED STATES SUPREME COURT:

ORDER

IT IS SO ORDERED.

DATED: January 12, 1967

A. ANDREW HAUK

ON MOTION FOR EXTENSION OF TIME TO FILE CLERK'S AND REPORTER'S TRANSCRIPTS ON APPEAL AND TO DOCKET RECORD WITH UNITED STATES SUPREME COURT:

ORDER

IT IS SO ORDERED.

DATED: February 3, 1967.

A. ANDREW HAUK
UNITED STATES DISTRICT JUDGE

ON MOTION FOR EXTENSION OF TIME TO FILE CLERK'S AND REPORTER'S TRANSCRIPTS ON APPEAL AND TO DOCKET RECORD WITH UNITED STATES SUPREME COURT:

IT IS SO ORDERED.

Dated: March 8, 1967

A. ANDREW HAUK
UNITED STATES DISTRICT COURT
JUDGE

APPENDIX "C"

APPENDIX D

CASE No. 66-861 AAH

WILLIAM PINKUS, vs. ARNEBERGH, etc. et al

ON MOTION FOR EXTENSION OF TIME TO FILE REPORTER'S TRANSCRIPT ON APPEAL AND TO DOCKET RECORD WITH UNITED STATES SUPREME COURT:

ORDER

It is so Ordered extended to Jan. 15, 1967.

Dated: December 2, 1966

A. ANDREW HAUK

ON MOTION FOR EXTENSION OF TIME TO FILE CLERK'S AND REPORTER'S TRANSCRIPTS ON APPEAL AND TO DOCKET RECORD WITH UNITED STATES SUPREME COURT:

ORDER

IT IS SO ORDERED.

Dated: Jan. 12, 1967

A. ANDREW HAUK

ON MOTION FOR EXTENSION OF TIME TO FILE CLERK'S AND REPORTER'S TRANSCRIPTS ON APPEAL AND TO DOCKET RECORD WITH UNITED STATES SUPREME COURT:

ORDER

IT IS SO ORDERED.

DATED: February 3, 1967.

A. ANDREW HAUK
UNITED STATES DISTRICT JUDGE

ON MOTION FOR EXTENSION OF TIME TO FILE CLERK'S AND REPORTER'S TRANSCRIPTS ON APPEAL AND TO DOCKET RECORD WITH UNITED STATES SUPREME COURT:

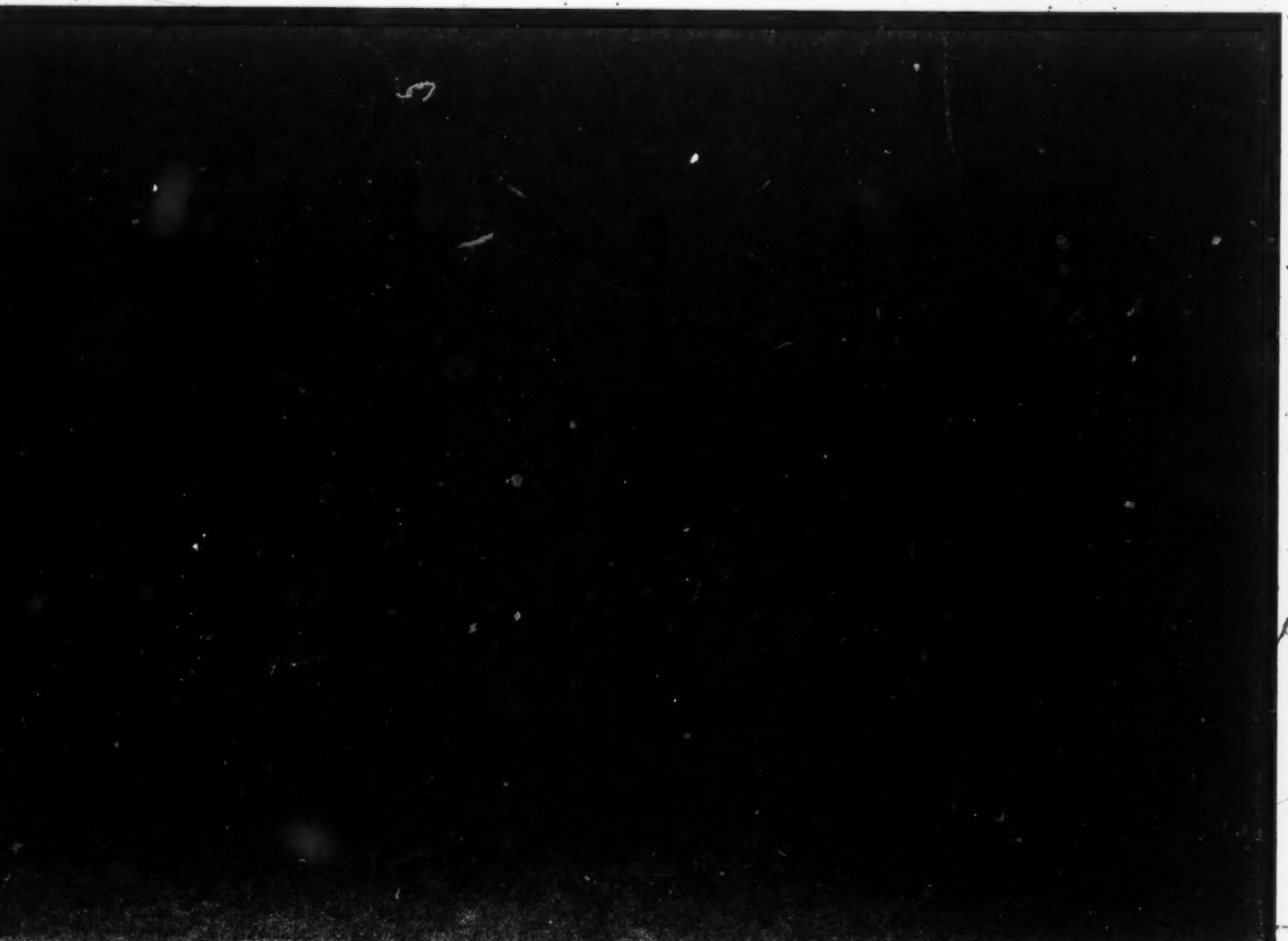
ORDER

IT IS SO ORDERED.

Dated: March 8, 1967.

A. ANDREW HAUK
UNITED STATES DISTRICT COURT
JUDGE

APPENDIX "D"



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IN THE

Supreme Court of the United States

October Term, 1966
No. .....

HARRY SCHACKMAN; JOSEPH GROSS; NATHAN DE-LUCA; HARRY PINCH; CHARLES GARY STRIEBY and JOSEPH RICHARD TOUART,

Petitioners,

vs.

ROGER ARNEBERGH, City Attorney for the City of Los Angeles, *et al.*,

Respondents.

WILLIAM PINKUS,

Petitioner,

vs.

ROGER ARNEBERGH, City Attorney for the City of Los Angeles, *et al.*,

MOTION TO DISMISS OR AFFIRM.

Appellees Roger Arnebergh, City Attorney for the City of Los Angeles; Evelle J. Younger, District Attorney for the County of Los Angeles; William H. Parker, Chief of Police of the City of Los Angeles; Peter J. Pitchess, Sheriff of the County of Los Angeles; Thomas C. Lynch, Attorney General of the State of California; Municipal Court of the Beverly Hills Judicial District, County of Los Angeles, State of Cali-

fornia; Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California; and Board of Police Commissioners of the City of Los Angeles, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the appeal heretofore filed with this Honorable Court in each of the above entitled cases be dismissed, or, in the alternative, that the final judgment and decree of the District Court be affirmed in each such case on the grounds that:

(a) That the appeal is not within the jurisdiction of this Court because not taken in conformity to statute or to these rules.

(b) That it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Statement.

Appellants have jointly appealed from the final judgments and orders of the United States District Court, Central District of California, dismissing appellants' complaints on the ground they failed to state a claim against Appellees upon which relief could be granted and entered pursuant to motions for Summary Judgment and Motions to Dismiss (treated as Motions for Summary Judgment).

Appellant sought the empanelment of a three-judge court for a declaration that the films and magazines incorporated into their complaints by reference and

which were the subject matter of criminal prosecutions were not obscene as a matter of law, and that the enforcement, operation and execution of the California obscenity statute deprived them of their civil and constitutional rights as protected by the First (freedom of speech), Fourth (freedom from unreasonable search and seizure) and Fourteenth (equal protection of the laws) Amendments to the Constitution of the United States. Appellants further sought injunctive relief against Appellee courts, law enforcement agencies, and city, county and state officers to prohibit them from conducting such prosecutions, together with an order compelling such courts, agencies and persons to establish a pre-prosecution and pre-arrest censorship system to which Appellants could submit film and magazines for a determination of obscenity prior to exhibition or distribution.

Evidence consisting of the films and magazines referred to in said complaint, arrest reports covering the arrests of Appellants and detailed and comprehensive affidavits covering all stages of law enforcement procedures followed in prosecutions under Penal Code Section 311.2 and in the prosecutions of Appellants were submitted to the District Court. After consideration of the pleadings, the evidence submitted by the parties, and the arguments of the parties, the District Court made its decision, findings of fact and conclusions of law that Appellants' application for a three-judge court be denied on the grounds that the com-

plaint did not allege a basis for equitable relief, that no substantial federal question was presented requiring a three-judge court, and that the films and magazines incorporated in the complaint as exhibits were clearly obscene and pornographic in the hard core sense in that they came within the reasonable purview and ambit of both the federal judicial and California statutory definitions of obscenity and hard core pornography, so that the Court found no substantial federal question by way of a deprivation of any civil or constitutional right, whether protected by the Civil Rights Acts or the First, Fourth or Fourteenth Amendments to the Constitution of the United States.

The Court also found that appellees acted in good faith, without malice and in the lawful performance of their duties in the arrests and prosecutions of appellants; that appellees had reasonable cause to believe that the films and magazines were within the ambit and purview of California Penal Code Section 311.2; that as public officers, appellees were immune from suit under the Civil Rights Acts for conduct in performance of their duties in good faith; that no appellee entered into any conspiracy or scheme to enforce Penal Code Section 311.2 or any other law in any illegal, wrongful or arbitrary manner nor performed any wrongful act which proximately caused injury or damage to any appellant; that California statutes furnish standards and guide-lines for the arrest and prosecution of public offenses which procedures were fol-

lowed by appellees herein; that neither the Constitution nor law of the United States or the State of California require judicial determination of obscenity prior to the institution in good faith of a prosecution or arrest for violation of the state obscenity laws.

Questions Presented.

The questions presented on this appeal are:

1. Was the Court below required to empanel a three-judge Court?

2. Is any substantial question presented that:

(a) appellees conspired to enforce California Penal Code Section 311.2 in an illegal, wrongful and arbitrary manner so as to deprive appellants of due process, equal protection of the laws, freedom of speech or press, or freedom from unreasonable search and seizure?

(b) the Constitution or laws of the United States or of the State of California require a judicial determination of obscenity prior to the institution, in good faith, of a prosecution or arrest for violation of the state obscenity laws?

ARGUMENT.

The District Court Was Not Required to Convene a Three-Judge Court.

The decision of the District Court is plainly correct. Even though the constitutionality of a state statute is challenged in a suit for injunction, the convening of a three-judge court is not required and a single judge has power to dismiss the complaint for want of jurisdiction (*Ex parte Poresky* (1933), 290 U.S. 30, 78 L. Ed. 152, 54 S. Ct. 3); as where there is a lack of a substantial federal question warranting exercise of jurisdiction in a nondiversity case (*Swift & Co. v. Wickham* (1965), 382 U.S. 111, 15 L. Ed. 2d 194, 86 S. Ct. 258; *Bailey v. Patterson* (1962), 369 U.S. 31, 7 L. Ed. 2d 512, 82 S. Ct. 549) or a lack of equity jurisdiction (*Jacobs v. Tawes* (4 Cir. 1957), 250 Fed. 611; *Public Service Com. v. Wycoff* (1952), 344 U.S. 237, 73 S. Ct. 276, 97 L. Ed. 291), or failure to show that a full and adequate state remedy does not exist. (*Priceman v. Dewey* (1949 D.C. N.Y.), 81 F. Supp. 557; *Rosso v. Puerto Rico* (1964 D.C. Puerto Rico), 226 F. Supp. 688).

A lack of substantiality appears when the constitutional question is without merit (*Gate Film Club v. Pesce* (1964 D.C. N.Y.), 236 F. Supp. 828, Aff'd. (2 Cir.), 339 F. 2d 888, cert. den. 380 U.S. 944, 85 S. Ct. 1023, 13 L. Ed. 2d 963); or where its unsoundness so clearly results from previous decisions (*Moss v. Hornig* (2 Cir. 1963), 314 F. 2d 89; *Bailey v. Patterson*, 369

U.S. 31 (*supra*); *Turner v. Memphis* (1962), 369 U.S. 350, 7 L. Ed. 2d 762, 82 S. Ct. 805 (*California Water Service Co. v. City of Redding* (1938), 304 U.S. 252, 82 L. Ed. 1323, 58 S. Ct. 865; *Bell v. Waterfront Com.* (2 Cir. 1960), 279 F. 2d 853).

A three-judge court is required only where plaintiff attacks the constitutionality of the statute, and is not required where the attack is limited to the unconstitutional result reached; a three-judge court is not required where the statute is susceptible of a construction and application which does not violate the Federal Constitution and is only misconstrued or erroneously applied in an individual case, but a three-judge court is required where the statute is not susceptible of a construction which does not violate the Federal Constitution. (See Anno. 15 L. Ed. 2d 918; *Bartlett & Co. Grain v. State Corp. Com.* (1963 D.C. Kan.), 223 F. Supp. 975; *Phillips v. United States* (1941), 312 U.S. 246, 85 L. Ed. 800, 61 S. Ct. 480; *Evergreen Review Inc. v. Cahn* (D.C.N.Y. 1964), 230 F. Supp. 498).

Both the complaint and notice of appeal [R. 270] filed by Appellants indicate that their attack upon Penal Code Section 311.2 is predicated not upon the statute itself, but upon Appellees' allegedly illegal actions in enforcing such statute. The complaint alleges that the Appellees conspired to enforce the statute "in an illegal, wrongful and arbitrary manner" [R. 8] alleges that a controversy exists as to whether ". . . California

Penal Code Section 311.2 as applied, *pursuant to and as a result of the conspiracy of Respondents*" violates constitutional rights [R. 14] and prays that the Court declare, said Section 311.2 "as applied, pursuant to and as a result of the conspiracy of Respondents" violates the Constitution [R. 17].

No Substantial Question Was Presented as to Violations of Civil Rights or as to Rights, Privileges or Immuities Guaranteed by the Constitution or Laws of the United States or State of California.

Appellants action was without merit in that no violation of any of the provisions of the Civil Rights Act (42 U.S.C. 1981-1985, 1988) other statutes, or the Constitution of the United States was alleged or established. Federal rights statutes are not a basis for civil actions for damages against public officers acting in their official capacities in good faith and pursuant to state law (*Barr v. Matteo,* 360 U.S. 564, 3 L. Ed. 2d 1434, 79 S. Ct. 1335; *Gregoire v. Biddle* (C.A. 2d 1949), 177 Fed. 579; *Bradley v. Fisher,* 80 U.S. (13 Wall.) 335, 20 L. Ed. 646).

Appellants, Roger Arnebergh, City Attorney for the City of Los Angeles, Evelle J. Younger, District Attorney for the County of Los Angeles, William H. Parker, Chief of Police of the City of Los Angeles, Peter J. Pitchess, Sheriff of the County of Los Angeles, and Thomas C. Lynch, Attorney General of the State of California, are each and all immune from suit under the Civil Rights Acts for conduct in the

performance of their official duties. (*Agnew v. Moody* (9 Cir. 1964), 330 F. 2d 868, 869, cert. den. 379 U.S. 867; *Rhodes v. Houston* (D.C. Neb. 1962), 202 F. Supp. 624, Aff'd 309 F. 2d 959, cert. den. 372 U.S. 909; *Rhodes v. Meyer* (8 Cir. 1964), 334 F. 2d 709, 718; *Puett v. City of Detroit* (6 Cir. 1963), 323 F. 2d 591; *Kenny v. Fox* (6 Cir. 1956), 232 F. 2d 288, cert. den. 325 U.S. 855, 1 L. Ed. 2d 66).

Neither the County of Los Angeles, the Municipal Courts nor the Board of Police Commissioners is a person within the meaning of the Civil Rights Act (*Monroe v. Pape,* 365 U.S. 167, 187, 188, 5 L. Ed. 2d 492, 505-507, 81 S. Ct. 473).

Only a case of manifest oppression will justify a federal court in enjoining public officials acting under color of authority in carrying out their duties under state law. (*Rhodes v. Houston* (*supra*), 202 F. Supp. 624; *NAACP v. Gallion,* 290 F. 2d 337, vacated on other grounds 368 U.S. 16, 7 L. Ed. 2d 85, 82 S. Ct. 4).

Federal Courts of Equity are loath to restrain criminal prosecutions by states, even on constitutional grounds, where all constitutional issues can be decided in the first instance as a matter of course by the state courts. (*Moss v. Hornig* (C.A. 2d 1963), 314 F. 2d 89, 91; *Stefanelli v. Minard,* 342 U.S. 117, 120, 96 L. Ed. 138, 72 S. Ct. 118 (1951); *Douglas v. City of Jeanette,* 319 U.S. 157, 163-164, 87 L. Ed. 1324, 63 S. Ct. 877 (1943)).

Unlike the complaint involved in *Dombrowski v. Pfister* (1965), 380 U.S. 479, 14 L. Ed. 2d 22, 85 S. Ct. 1116, where it was alleged that the statutes on their face violated First and Fourteenth Amendment guarantees because overbreadth made them suspectible of sweeping and improper application, here no such claim is made; rather, this complaint is against an alleged conspiracy of Appellees to illegally arrest and prosecute under an otherwise valid statute. While it is not settled whether suits under the Civil Rights Acts come within the "expressly authorized" section of 42 U.S.C. §2283, the courts recognize "that federal interference with a State's good faith administration of its criminal laws is particularly inconsistent with our federal framework". (*Dombrowski v. Pfister* (*supra*), 380 U.S. at page 484).

The procedures afforded by California law for the enforcement of Penal Code Section 311.2 meet constitutional requirements of due process.

> "If the procedure prescribed by the State actually affords the character of due process contemplated by the federal Constitution, and is followed, there is no denial of the right under the federal constitution. While if it does not, or is not followed, the right has been violated. Smith v. State of Texas, 311 U.S. 128, 61 S. Ct. 114, 85 L.Ed. 84; Hill v. State of Texas, 316 U.S. 400, 62 S. Ct. 1159 86 L.Ed. 1559." (*Mueller v. Powell* (C.A. 8, 1953), 203 F. 2d 797, 800).

California laws relating to arrests and searches meet the fundamental criteria and standards required by the federal Courts in applying Constitutional standards. (*Ker v. California* (1963), 374 U.S. 31, 10 L. Ed. 2d 726, 83 S. Ct. 1623.) California law relating to the authority of a peace officer to arrest (Penal Code Section 836), time within which the arrested person must be presented to a magistrate (Penal Code Section 825), and complaint filed (Penal Code Section 849); the arrested person's right to bail (Penal Code Section 1272); his right to a speedy and public trial, counsel, witnesses on his behalf, confrontation of witnesses and cross-examination (Penal Code Section 686, Calif. Const. Art. 1 §13); his right to a jury trial in all criminal cases (California Const. Art. 1, §7); preference in setting for trial (Penal Code Section 1050); right to test the sufficiency of complaint by demurrer (Penal Code Section 1004), and his right to supress or secure return of evidence illegally seized (Penal Code Section 1539-1540) are set forth in pertinent text in the Appendix hereto. While denial of a motion to return, like denial of a motion to suppress is not reviewable on appeal, a discretionary review by writ of mandate is available (*People v. Gershenhorn,* 225 Cal. App. 2d 122, 124-126).

California obscenity statutes, as amended in 1961, are in accord with the constitutional requirements laid down and discussed in *Mishkin v. New York,* ..... U.S. ....., 86 S. Ct. 958, 16 L. Ed. 2d 56, and *A Book named John Cleland's Memoirs v. Attorney General,*

.... U.S. ...., 86 S. Ct. 975, 16 L. Ed. 2d 1. As stated in *Mishkin* at page 61, "The New York Courts have interpreted

> "obscenity in §1141 to cover only so called 'hard core pornography' See *People v. Richmond County News, Inc.*, 9 NY 2d 578, 586-587 . . . Since that definition of 'obscenity' is more stringent than the Roth definition, the judgment that the constitutional criteria are satisfied is implicit in the application of §1141 below".

The same statement, but substituting Penal Code Section 311.2 and *Zeitlin v. Arnebergh*, 59 Cal. 2d 901 for the statute and case cited, can be said of the California Courts and the constitutionality of its obscenity laws.

The California statute, by use of the word "knowingly" defined therein to mean "having knowledge that the matter is obscene" satisfies the constitutional requirement of scienter as pointed out in *Smith v. California* (1959), 361 U.S. 147, 4 L. Ed. 2d 205, 80 S. Ct. 215. (*Mishkin v. New York* (*supra*), 16 L. Ed. 2d at pages 62, 63).

The control of obscenity by criminal prosecutions, under proper standards, is constitutional (*Alberts v. California*, 354 U.S. 476, 495, 1 L. Ed. 2d 1498, 1513, 77 S. Ct. 1304; *Kingsley Books v. Brown*, 354 U.S. 436, 440, 1 L. Ed. 2d 1469, 1473, 77 S. Ct. 1325). A state is not limited in the remedy it selects so long as due process is observed (*Kinglsey Books v. Brown* (*supra*), cited in part in *Times Film Corp. v. Chicago*

(1961), 365 U.S. 43, 50, 5 L. Ed. 2d 403, 408, 81 S. Ct. 391).

Neither the California statute nor the procedures provided by California law are so vague or standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and juries free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case. (*Roth v. United States* (1957), 354 U.S. 476, 491, 1 L. Ed. 2d 1498, 1511, 77 S. Ct. 1304; *Kingsley Books v. Brown, supra,* 345 U.S. 436, 441).

No California Statute nor Any Requirement of the Constitution of the United States Requires a Judicial Determination of Obscenity as a Condition Precedent to the Institution in Good Faith of a Complaint and/or Arrest for Violation of the State Obscenity Laws.

The provisions of California statutes giving appellants the right to suppress or secure the return of evidence allegedly illegally seized (Penal Code Sections 1539-1540) and the availability of the Writ of Mandate (*People v. Gershenhorn, supra,* 225 Cal. App. 2d 122, 124-126) places the California procedure in a different constitutional light than the Missouri procedure condemned in *Marcus v. Search Warrant of Property, etc.* (1961), 267 U.S. 717, 6 L. Ed. 2d 1127, 81 S. Ct. 1708. (*People v. Campise* (1966), 242 Cal. App. 2d .... (242 A.C.A. 713, App. Dept. Sup. Ct. San Diego)).

For the reasons stated, it is respectfully submitted that the appeal in each case should be dismissed, or in

the alternative, that the judgment and decree of the District Court in each case should be affirmed.

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APPENDIX A.

California Constitution.

Art. I §7. The right of trial by jury shall be secured to all, and remain inviolate; but in civil actions three-fourths of the jury may render a verdict. A trial by jury may be waived in all criminal cases, by the consent of both parties, expressed in open court by the defendant and his counsel, and in civil actions by the consent of the parties, signified in such manner as may be prescribed by law. In civil actions and cases of misdemeanor, the jury may consist of 12, or of any number less than 12 upon which the parties may agree in open court. [Amendment adopted November 6, 1928.]

Art. I §13. In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend, in person and with counsel. No person shall be twice put in jeopardy for the same offense; nor be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; . . . [Constitution of 1849, Art I, Sec 8, revised 1879; amended November 6, 1934.]

California Penal Code.

§686. [Rights of defendant: Speedy and public trial: Counsel: Production and confrontal of witnesses: Exceptions.] In a criminal action the defendant is entitled:

1. To a speedy and public trial.

2. To be allowed counsel as in civil actions, or to appear and defend in person and with counsel.

3. To produce witnesses on his behalf and to be confronted with the witnesses against him, in the presence of the court, . . . [Enacted 1872; Am Stats. 1911, p. 364.]

§825. [Time within which defendant must be taken before magistrate: Attorney may visit prisoner: Refusal to permit visit a misdemeanor: Forfeiture for refusal and recovery thereof.] The defendant must in all cases be taken before the magistrate without unnecessary delay, and, in any event, within two days after his arrest, excluding Sundays and holidays; and after such arrest, any attorney at law entitled to practice in the courts of record of California, may at the request of the prisoner or any relative of such prisoner, visit the person so arrested. . . . [Enacted 1872; Am. Code Amdts. 1880, p. 30; Stats. 1907, p. 888; Stats. 1927, p. 1044.]

§836. [Arrests by peace officers: Arrest under warrant or without warrant.] A peace officer may make an arrest in obedience to a warrant, or may without a warrant, arrest a person;

1. Whenever he has reasonable cause to believe that the person to be arrested has committed a public offense in his presence.

2. When a person arrested has committed a felony, although not in his presence.

3. Whenever he has reasonable cause to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed. [Enacted 1872; Am. Stats. 1957, ch. 2147, §2.]

§849. [Arrest without warrant: Person arrested to be taken before nearest magistrate: Complaint to be

laid: Right of peace officer to release person arrested from custody.] (a) When an arrest is made without a warrant by a peace officer or private person, the person arrested, if not otherwise released, must, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the offense is triable, and a complaint stating the charge against the arrested person, must be laid before such magistrate.

(b) . . . [Enacted 1872; Am. Stats. 1935, p. 874; Stats. 1957, Ch. 2147, §6.]

§1004. [Grounds for demurrer.] The defendant may demur to the accusatory pleading at any time prior to the entry of a plea, when it appears upon the face thereof either:

1. If an indictment, that the grand jury by which it was found had no legal authority to inquire into the offense charged, or, if an information or complaint that the court has no jurisdiction of the offense charged therein;

2. That it does not substantially conform to the provisions of Sections 950 and 952, and also Section 951 in case of an indictment or information;

3. That more than one offense is charged, except as provided in Section 954;

4. That the facts stated do not constitute a public offense;

5. That it contains matter which, if true, would constitute a legal justification or excuse of the offense charged, or other legal bar to the prosecution. [Enacted 1872; Am. Code Amdts. 1880, p. 18; Stats. 1905, p. 772; Stats. 1951, ch. 1674, §73.]

§1050. [When cases to be set for trial: Precedence of criminal cases: Continuances: Defendant's attorney member of Legislature: Length of continuance: Entry of facts in minutes: Dismissal under §1382.] The welfare of the people of the State of California requires that all proceedings in criminal cases shall be set for trial and heard and determined at the earliest possible time, and it shall be the duty of all courts and judicial officers and of all prosecuting attorneys to expedite such proceedings to the greatest degree that is consistent with the ends of justice. In accordance with this policy, criminal cases shall be given precedence over, and set for trial and heard without regard to the pendency of, any civil matters or proceedings. . . . [Added by Stats. 1927, p. 1036; Am. Stats. 1945, ch. 1512, §3; Effective July 18, 1945; Stats. 1959, Ch. 1693, §2.]

§1272. When admitted to bail after conviction and upon appeal. After conviction of an offense not punishable with death, a defendant who has appealed may be admitted to bail;.

1. As a matter of right, when the appeal is from a judgment imposing a fine only.

2. As a matter of right, when the appeal is from a judgment imposing imprisonment in cases of misdemeanor.

3. As a matter of discretion in all other cases. [Enacted 1872; Am. Stats. 1909, p. 591.]

§1539. Proceedings, if grounds of warrant are controverted: [Taking of depositions]. If the grounds on which the warrant was issued be controverted, he must

proceed to take testimony in relation thereto, and the testimony of each witness must be reduced to writing and authenticated in the manner prescribed in section eight hundred and sixty-nine. [Enacted 1872.]

§1540. Property, when to be restored to person from whom it was taken. If it appears that the property taken is not the same as that described in the warrant, or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the magistrate must cause it to be restored to the person from whom it was taken. [Enacted 1872.]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

SCHACKMAN ET AL. *v.* ARNEBERGH.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA.

No. 1186. Decided May 29, 1967.

PER CURIAM.

Appellants seek review by this Court of the refusal by the District Court to convene a three-judge District Court pursuant to 28 U. S. C. §§ 2281–2284. We have held that such review is available in the Court of Appeals, *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U. S. 713, and not in this Court. *Buchanan* v. *Rhodes*, 385 U. S. 3.

The motion to dismiss is granted and the appeal is dismissed for lack of jurisdiction.